

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1402

To be argued by
SCOTT G. CAMPBELL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1402

UNITED STATES OF AMERICA,

—v.—

MARION KNUCKLES, a/k/a "GLENN,"
RAYMOND BROWN and ROSE SMITH,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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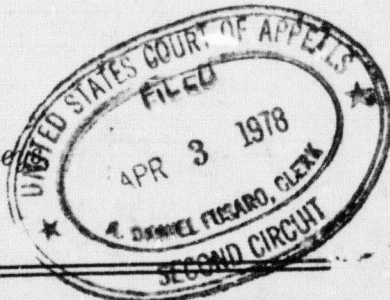


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—v.—

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RAYMOND BROWN AND ROSE SMITH,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Marion Knuckles, a/k/a "Glenn," Raymond Brown and Rose Smith appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on July 14, 1977, after a seven day jury trial before the Honorable Charles S. Haight, Jr., United States District Judge.

Indictment 77 Cr. 340, filed May 5, 1977, charged Knuckles, Brown, Smith, Yolanda Valdez Simpson ("Simpson") and Jane Doe, a/k/a "Gwen," later identified as Gwendolyn Owen, with two counts of violating the federal narcotics laws. Count One charged all the defendants with conspiracy to possess with intent to distribute Schedule I and Schedule II drug controlled substances, in violation of Title 21, United States Code, Section 846. Count Two charged all defendants with the distribution and possession with intent to distribute of

approximately 2,000 quarter bags of heroin on or about October 1, 1976, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).

Trial as to all defendants but Simpson and Owen * commenced on July 5, 1977, and concluded on July 14, 1977, when the jury returned guilty verdicts on both counts against Knuckles and Brown and on Count One against Smith. On September 12, 1977, Judge Haight sentenced Knuckles to consecutive terms of eight years' and four years' imprisonment on Counts One and Two, respectively, and ten years' special parole. On August 31, 1977, Brown was sentenced to consecutive terms of eight years' and one year's imprisonment on Counts One and Two, respectively, and six years' special parole; and Rose Smith received a sentence of five years' imprisonment on Count One and six years' special parole.**

Knuckles, Brown and Smith are presently serving their sentences.

Statement of Facts

A. The Government's Case

The Government's proof showed that in the fall of 1976 Marion Knuckles, Raymond Brown and Rose Smith, together with Yolanda Simpson, prepared over 4,000 quarter bags *** of heroin for ultimate sale on the streets

* Simpson pleaded guilty to Count One prior to trial and testified as a witness called by the Government. Owen was severed from the remaining three defendants on the morning of the trial and later pleaded guilty to a superseding information, S77 Cr. 340, filed January 11, 1978. Owen presently is a fugitive.

** On July 21, 1977 Simpson was sentenced to a suspended sentence and placed on special parole for years.

*** As explained in the trial testimony by Government witnesses, heroin commonly is sold on the street in a quantity known as a "quarter" for approximately \$50-\$60. The "quarter" contains heroin diluted with bonita and other substances.

of New York City. The evidence showed the inner workings of a narcotics factory which turned raw material—heroin—into consumable size quantities of diluted heroin to be sold by street dealers. The focus of the evidence—and the basis for the substantive count—was one such occasion in late September-early October, 1976, when Knuckles, Brown, Smith and Simpson met one evening in Simpson's apartment at 626 Riverside Drive. In an all-night session they sifted, mixed and bagged over 2,000 quarters of heroin.

1. Background

To show the background and development of the conspiracy charged in this case, the Government offered the testimony of Simpson, Warren Sims, and Betty McFarland, who collectively described how the defendants came to know one another in an earlier operation when Knuckles and Brown worked together distributing heroin quarter bags to street dealers in New York City (Tr. 66-71, 499-502, 739-40, 746-47).^{*} The center of their activity was two bars in Manhattan—the Roma Gardens at 116th Street and 8th Avenue, and the Satin Doll at 117th Street and 8th Avenue.

According to Sims, Knuckles directed the street operation from Roma Gardens, and Brown was his chief assistant. Sims testified that on several occasions he went with Knuckles and Brown to the Bronx where large quantities of heroin quarters were exchanged. (Tr. 507-10). At one point in December 1975 and January 1976, Sims assumed for Knuckles the responsibility of paying Brown's salary of \$500 per week. (Tr. 524; GX 9, 9A). Betty McFarland explained that during 1973 and 1974 she sold heroin quarters for Knuckles' organization and that Brown often would deliver the packages to

^{*} "Tr." refers to Trial Transcript; "GX" refers to Government Exhibit and "Br." refers to the Brief of the specified defendant. "A" refers to the Appendix of the specified defendant.

her. (Tr. 740, 747). To complete the picture, Simpson described for the jury how she started running errands for Knuckles in 1975 and that, for a short period of that time, Knuckles paid her \$300 per week. (Tr. 66-70). By the middle of 1976, however, the organization became temporarily inactive while Knuckles occupied himself establishing a fish food stand at a penny arcade in South Carolina. (Tr. 69-71, 637-638; GX 10, 10B).

2. The Conspirators Reunite

Knuckles returned to New York City in the summer of 1976. Shortly after his return, Simpson asked Knuckles if she could work at the "table" for him.* As a result of their discussions, a couple of weeks later Knuckles took Simpson and several others to an apartment above the Satin Doll Bar. There, they prepared approximately 1,500 quarter bags of heroin for distribution. (Tr. 71-74). After this operation was completed Knuckles returned to South Carolina. (Tr. 86).

Later in the summer Knuckles again returned to New York. On August 16, 1976, Sims, who just had begun cooperating with the Office of the Special State Narcotics Prosecutor, had a telephone conversation with Knuckles in New York City. In that conversation, which was recorded and played for the jury, Knuckles described the condition of the "street" for selling narcotics and indicated that he was going to "hold off" any selling until he felt comfortable about it. (Tr. 560; GX 10, 10A).

Conditions on the street obviously had changed, at least in Knuckles' mind, by late August, when Knuckles and Simpson met at the Satin Doll. Knuckles explained

* According to Simpson and Sims, working at a "table" is the narcotics jargon for the heroin mixing and bagging process. The name is derived from the fact that this operation commonly takes place on a big glass table. (Tr. 58-61, 64-66, 518).

that he would have work at a "table" for her if she could find them an apartment to use. (Tr. 90). Simpson found such an apartment on Amsterdam Avenue. (Tr. 91). In preparation for the operation Simpson and Raymond Brown purchased new sifters at Knuckles' instruction. (Tr. 92; GX 1, 1A). Later that evening, Knuckles met Brown, Rose Smith and Simpson at the apartment and they worked all night sifting, spooning and bagging approximately 1,500 quarter bags of heroin. (Tr. 94-95). Knuckles paid Simpson \$500 for her assistance at this "table."

3. The Tabling Operation at 626 Riverside Drive

Three weeks later, Knuckles asked Simpson if a different apartment was available for use to prepare quarters. Simpson proposed her own apartment at 626 Riverside Drive, (Tr. 96), and Knuckles agreed to the offer on Simpson's assurance that her husband, Robert Simpson, would not be present during the evening's operation. (Tr. 96, 247-48, 693).

A few days later Knuckles told Simpson to meet him in the vicinity of 95th Street and 5th Avenue. (Tr. 97). Upon her arrival, Simpson saw Knuckles, Brown and Owen at the side door of an apartment building with boxes and bags to be loaded into her car. (Tr. 99). Brown helped Simpson place the materials into her car and the two proceeded to Simpson's apartment at 626 Riverside Drive where the materials were deposited into a closet. (Tr. 100). Simpson later identified the contents as quinine, bonita and cutting paraphernalia. (Tr. 108, 113-14).

The following day at the Roma Gardens arrangements were made for Simpson to meet Knuckles again at the 95th Street and 5th Avenue building. (Tr. 102). The planned meeting took place and they proceeded to the

second floor apartment of Gwen Owen.* Then, Knuckles accompanied Gwen Owen to the rear of the apartment and returned with a pink shopping bag. (Tr. 103; GX 2). Knuckles delivered the bag to Simpson and instructed her to take it back to the apartment. (Tr. 103).

Later that evening Knuckles met Simpson at her apartment to work at the "table." In elaborate fashion Knuckles set up the glass dining room table with the separate bags of white powder, strainers and spoons. (Tr. 105). For several hours they prepared the heroin and dilutants for bagging—sifting the heroin, bonita and quinine separately and mixing them together. (Tr. 105-111). Later, Raymond Brown and Rose Smith arrived to assist with the bagging process. (Tr. 111-13). On through the night the four worked in assembly line fashion filling and wrapping approximately 2,000 quarter bags of heroin. (Tr. 114-16). Finally, in the early morning hours Knuckles departed with a shopping bag filled with quarter bags and directed Simpson to deliver the remainder to him later that day at the Roma Gardens. (Tr. 117-18). Simpson followed Knuckles' instructions, but left behind in her apartment the paraphernalia. (Tr. 118-19, 192, 272, 373-74; GX 1, 1A, 3, 4, 4A, 5).**

* According to Sims, Knuckles referred to Gwen Owen as a heroin source. On one occasion in September, 1975, Sims testified that Knuckles drove him down to an apartment building on 5th Avenue, entered the building and returned with Gwen Owen who greeted Sims. (Tr. 511-13). In the ride uptown, Knuckles showed him a sample of heroin that he had obtained.

** Some six months later, on April 19, 1977, this narcotics paraphernalia was recovered by DEA agents from the 626 Riverside Drive apartment, pursuant to a consent search given by Robert Simpson, and the paraphernalia was introduced in evidence. (Tr. 373-78; GX 1, 1A, 3, 4, 4A and 5). Robert Simpson testified that he found the paraphernalia in the den when he returned to the apartment shortly after the table operation and washed it all in the kitchen sink. (Tr. 694-95).

4. Distributing the Proceeds

Several days after their night's work, Simpson unsuccessfully sought her compensation from Knuckles for working at the "table." (Tr. 119). She also learned that neither Brown nor Smith had received any money. (Tr. 120-21). Impatient, Simpson again sought out Knuckles at the Roma Gardens and he finally delivered to her approximately \$500. (Tr. 122). However, Simpson still was dissatisfied with Knuckles' payment, since she had permitted him to use her apartment, as well as participated at the "table." Simpson then confronted Knuckles at the Roma Gardens and demanded more money. (Tr. 124, 129-31). Sharp words were exchanged between the two, leading to a street scuffle which resulted in facial injuries suffered by Simpson.* (Tr. 129-131, 242, 699; GX 11, 12).

Simpson spent the evening she received her down payment of her share of the money at the Stadium Motel Lodge in the Bronx. The following day she discussed Knuckles' refusal to pay more with Sims, and sought his help in obtaining what she considered to be her fair share of the expected proceeds from the "tabling" operation. (Tr. 131, 136; GX 15). On October 12 and 14, 1976, Sims spoke with Simpson. (Tr. 136, 558). These conversations were recorded and played for the jury. (GX 12, 12A, 13 and 13A). During the conversations Simpson explained her predicament to Sims—the work she had performed for Knuckles, the money he had paid her and the fight which had ensued. Sims indicated he would try to help her.**

* Robert Simpson testified that during this time Yolanda returned to the apartment one evening, looking as though she had been in a fight. She told him that she had had a fight with Glenn. (Tr. 699).

** Betty McFarland testified that in October, 1976, she received a bundle of 500 "quarters" from Knuckles which she agreed

[Footnote continued on following page]

5. Post-Conspiracy Admissions

On May 6, 1977, Knuckles was arrested on a bench warrant issued following his indictment. The Government introduced evidence concerning certain statements made by Knuckles in a post-arrest interview in the United States Attorney's office.

DEA Agent Brophy testified that the post-arrest interview of Knuckles conducted on May 6, 1977, was begun by the Assistant United States Attorney advising Knuckles of his *Miranda* rights.* Knuckles indicated that "Glenn" was his nickname. (Tr. 351). Then, in response to a question by the Assistant United States Attorney concerning his involvement in narcotics, Knuckles claimed that he had not done any heroin in over two years and did not intend to do so. (Tr. 353). Knuckles declined to sign the statement. (Tr. 353).

Agent Brophy also testified about post-arrest statements made by Smith after she had been advised of her *Miranda* rights.**

B. The Defense Case

Knuckles and Smith presented no evidence.

In an attempt to impeach Simpson's testimony that Raymond Brown worked at the "table" at 626 Riverside Drive on the evening in early October, 1976, Brown

to sell. (Tr. 751). A few days after she had had them tested by a heroin addict, she told Knuckles that she would not sell them. (Tr. 754). The following day Brown asked McFarland for a package for Knuckles and she returned the 500 quarters to Brown. (Tr. 755).

* Following the arrest on the street, Brophy advised Knuckles of his *Miranda* rights. (Tr. 349).

** The written statement which Smith made to the Assistant United States Attorney also was admitted after undergoing redaction. (GX 21).

called Henry Gray, an owner of a taxi cab. Gray testified that Brown drove his cab during the evening hours in 1976. Gray conceded, however, on cross-examination that he did not know where Brown went with the cab each night and had no record of any particular night that Brown worked or did not work. (Tr. 866-72).

ARGUMENT

POINT I

The District Court's Charge Was Entirely Correct

With varying degrees of precision in stating the contention, all three defendants claim on appeal that the District Court in its charge presented the jury with an erroneous legal theory and amended the indictment. Specifically, defendants attack that portion of the trial judge's instructions in which, as a result of defendants' actions, he explained to the jury that if all the essential elements of either charge were satisfied beyond a reasonable doubt, a finding that the substance distributed was cocaine rather than heroin would be of no legal significance. Defendants now assert that this charge was error because the evidence was insufficient to support a finding of cocaine and because the instruction amended the charges in the indictment. As we now will demonstrate, defendants' collective argument on this point not only is legally unfounded, but truly is astounding in view of the position they took in the District Court where they claimed that there had been a fatal variance between the proof and the indictment because the evidence in fact *showed* the distribution of cocaine.

A. Proceedings in the District Court

The Government's case revolved around the testimony of co-conspirator Simpson who testified principally to the

defendants' activities on a particular night in September, 1976 when they processed a substantial amount of narcotics which she believed to be heroin. Seizing the opportunity to attempt to confuse the jury because of the absence of any physical narcotic evidence at trial, counsel for Knuckles developed during cross-examination of Simpson that some defendants had brought cocaine to Simpson's apartment on the night that they diluted and packaged heroin. (Tr. 198). Smith's counsel later reopened the same subject during cross-examination of another Government witness (Tr. 440), by eliciting that some of the utensils used by the defendants bore traces of cocaine, but not heroin. Again, as before, none of the defendants objected to this testimony or moved to strike it. The obvious point of defendants' tactic in eliciting this evidence was to attempt to confuse the jury by arguing that Simpson was wrong as to what narcotics had been packaged that night, and that this somehow should constitute a defense.

Continuing with this approach and despite the fact that defendants themselves knowingly had elicited the evidence about cocaine, at the Rule 30 charging conference defendants for the first time contended that there had been a fatal variance between the proof and the charges because the evidence showed the distribution of cocaine, not heroin. In making this argument, defendants openly suggested to the trial judge that the cocaine evidence was sufficient to lead the jury to believe that the substance packaged by Simpson and the other defendants was cocaine, not heroin. (Tr. 851-53, 902-904, 959, 967, 1164). All defendants argued to the trial judge that this variance entitled them to an acquittal.* (Tr. 891-912, 939-40, 955-971).

* Brown requested an instruction that if the jury found an agreement to distribute a narcotic controlled substance other than the one described in the indictment, then they must dismiss the indictment (Tr. 940). Defendant Brown's Request to Charge #6.

After hearing extensive argument, the trial court rejected defendants' "variance" claims. Based upon the sincerity and forcefulness with which defendants had pressed their arguments, however, the trial judge was led by defendants to conclude that the jury well could find that the absent drugs were cocaine, not heroin, and that this issue should be clarified for the jury. Thus confronted with the factual dispute suggested by defendants, and mindful of defendants' attempts throughout the trial to suggest to the jury that the substance packaged was cocaine, not heroin,* the district judge advised defendants that it would instruct the jury that it was of no legal significance whether the jury found that the substance charged in the indictment was cocaine.**

* "The Court: It really seems to me there is some force to that. It has been apparent throughout the course of the trial that the defendants have been putting themselves into a position of being able to argue to the jury that the government loses because the evidence, to the extent that it show anything, indicates cocaine and not heroin.

Having paved the foundation for that argument, if defense counsel then makes the argument with all the passion and eloquence at their command and then the very last thing before the deliberations start the Judge sits up there and says, 'Hey, it doesn't make any difference, you know, as a matter of law, whether it was cocaine or heroin,' that is not a particularly happy position for the defendants to find themselves in." (Tr. 896).

** The trial judge then instructed the jury as follows:

"I charge you as a matter of law that both heroin and cocaine are narcotic controlled drugs. That leads me to a particular instruction which I must give you.

There have been suggestions in this case that the particular substance which forms a part of the transactions and activities alleged in the indictment constituted cocaine and not heroin. I charge you that the statute under which this indictment is brought prohibits the distribution or possession with intent to distribute of certain controlled narcotic substances. And the conspiracy count in this indictment refers to the same underlying statute.

[Footnote continued on following page]

rather than heroin, if all of the essential elements were proven beyond a reasonable doubt. The defendants objected to these instructions solely on the ground of an alleged "variance" between the proof and the charges. (Tr. 1161).

Following the conclusion of the trial, Judge Haight amplified his oral opinion, rejecting the purported "variance" defense in a thorough nine page memorandum opinion. (Knuckles' A. 9-17). The District Court concluded, apropos defendants' arguments, that the claimed variance was immaterial and that the defendants had not suffered any prejudice whatsoever from the alleged variance be-

I charge you that both heroin and cocaine are controlled narcotic substances within the statute, and I charge you further that if you find that the Government has proved beyond a reasonable doubt each of the elements necessary to constitute a conspiracy as I have just given it to you, you find that each of those elements has been established beyond a reasonable doubt, then if you further find that the substance was not heroin but was cocaine, that particular fact is of no legal significance, and that is because the statute prohibits the distribution or possession with intent to distribute of either substance. That is equally true, I charge you, with respect to the substantive count.

If you find that each of the necessary elements in the substantive count have been proved by the government beyond a reasonable doubt, as I have defined that term to you, then if you make the additional finding that the substance in question was not heroin but was cocaine, that is of no legal significance.

In saying that to you, I am not suggesting for a moment whether you should find that the elements have been established or whether you should find that the substance in question was heroin or cocaine or any other substance. Those facts questions are entirely for you to decide. I am simply instructing you as a matter of law that if the elements are established it would make no difference if you make the further finding that the substance was not heroin but was cocaine." (Tr. 1144-46).

cause they were on sufficient notice of all events in question and had ample protection from any possibility of a dual prosecution.

B. The District Court's Charge Was Correct and Proper

Throughout the entire trial the defendants never claimed that there was insufficient evidence of cocaine to warrant the District Court's reference to that substance in its instructions, but claimed exclusively that the cocaine evidence constituted a fatal variance. Indeed, the District Court's treatment of the effect of a finding of cocaine versus heroin was occasioned *solely* by defendants' collective suggestion that the cocaine proof was *so substantial* as to amount to a variance. The post-trial opinion of the district judge further makes clear that the entire thrust of defendants' argument in the trial court was that proof of the cocaine which they elicited amounted to a fatal variance.

In remarkable contrast to their claims in the District Court that the cocaine evidence *was so substantial as to prove* a variance, defendants now argue first that it was *not proved* sufficiently to support the court's instructions that a finding of heroin or cocaine would permit the jury to convict. Defendants argue further that since the court's charge submitted an alternate theory for conviction and the jury could have predicated their general verdict on the insufficiently proven cocaine theory, the verdict impermissibly is ambiguous and cannot stand. A mere statement of defendants' incredible shift as to this part of their argument makes apparent that the present claim of insufficiency utterly is irreconcilable with the argument they urged upon the trial judge; indeed, defendants claimed the exact opposite position before Judge Haight.

This Court repeatedly has recognized that such shifting positions must not be countenanced and consistently has precluded assertion of contrary positions on appeal. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977). *See also*, *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977); *United States v. Fuentes*, 563 F.2d 527 (2d Cir. 1977); *United States v. Martinez-Carcano*, 557 F.2d 966 (2d Cir. 1977). Thus, for this reason alone, defendants' claim that there was insufficient evidence on the "alternate theory" submitted to the jury must be rejected.*

More fundamentally, however, defendants' argument is wrong that the charge submitted alternate theories for conviction to the jury, since, as a matter of law, whether the narcotic drug controlled substance in this case was heroin or cocaine did not matter. Both counts of the indictment referred generally to narcotic controlled substances, and the statutes alleged to have been violated also refer generally to narcotic controlled substances. The essential elements for conviction on either count simply were not altered by which of the two controlled substances was present. *United States v. Quicksey*, 525 F.2d 337, 341-42 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976). *See also*, *United States v. Works*, 526 F.2d 940, 947

* While at trial the Government clearly never argued the case to the jury as a cocaine conspiracy but argued to the jury that Simpson's testimony showed that the defendants had packaged heroin, it is nevertheless plain that the evidence was sufficient to justify a jury finding that in fact Simpson was mistaken, and that the conspirators had packaged cocaine, instead of heroin. The traces of cocaine on the processing paraphernalia and Simpson's testimony that cocaine was present during the operation, were enough to support a jury finding that Simpson was mistaken on her description of the narcotics as heroin. Naturally, this Court need not reach the question of sufficiency since, as we demonstrate, the trial judge required the jury to find the presence of a narcotic controlled substance beyond a reasonable doubt.

(5th Cir. 1976); *United States v. Moser*, 509 F.2d 1089 (7th Cir. 1975); *United States v. Ramirez*, 482 F.2d 807, 816-17 (2d Cir.), *cert. denied, sub nom. Gomez v. United States*, 414 U.S. 1070 (1973). In brief, while a difference between the proof and the charges as to the type of narcotics present might amount to a factual variance—and here the District Court properly determined it would be an immaterial variance—such a variance does not present an alternate legal theory for conviction as defendants appear to suggest.*

Indeed, this point is brought into sharp focus with respect to the conspiracy charge. With respect to Count One, the indictment clearly charged a narcotics conspiracy involving "Schedule I and II narcotic drug controlled substances." The essence of a narcotics conspiracy, of course, simply is the unlawful agreement to effectuate its object. The Government need not prove that the defendants actually possessed any narcotics substance, *United States v. Oates*, 560 F.2d 45, 44-56 n.6 (2d Cir. 1977); *United States v. Nuccio*, 373 F.2d 168, (2d Cir.), *cert. denied*, 387 U.S. 906 (1967), nor is it necessary to allege or prove any overt act in pursuance of the conspiracy. *United States v. Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975), *cert.*

* The point emphasized in the District Court, of course, was that while the Government clearly *did* prove that the defendants distributed heroin, for purposes of the crime the exact nature of the narcotics was immaterial. Under Title 21, United States Code, Section 841(a)(1), heroin and cocaine are indistinguishable: each is classified as a "controlled substance" and as a "narcotic drug"; 21 U.S.C. § 802(16), 812(c) Schedule I(b)(10) and Schedule II(a)(4) (1970); the punishment for the offense, distributing "a controlled substance", does not differ whether the "controlled substance" is cocaine or heroin. 21 U.S.C. § 841(b) and (c) (1970). The underlying statute makes plain that the gist of the substantive offense is the distribution of "a controlled substance". 21 U.S.C. § 841(a)(1) (1970). See, *United States v. Porter*, 544 F.2d 936 (8th Cir. 1976); *United States v. Vento*, 533 F.2d 838, 871 (3d Cir. 1976).

denied, 425 U.S. 970 (1976); *Ewing v. United States*, 386 F.2d 10, 15 (9th Cir. 1967); *United States v. Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966). Thus, so long as there was sufficient proof of the unlawful agreement to distribute *any* narcotic substance—and defendants now concede that the proof was ample—it simply does not matter whether the jury concluded that the substance was heroin or cocaine. *United States v. Ramirez*, *supra*, 482 F.2d at 817.*

Defendants' principal claim, however, is that the court's instructions impermissibly amended the substantive count, Count Two, of the indictment and under *Stirone v. United States*, 361 U.S. 212 (1959), required a reversal as to that count.** Defendants' argument, which is predicated exclusively on the trial court's proper instructions informing the jury of the legal implications of an immaterial variance, must be rejected.

First, defendants' failure to object to this evidence in the District Court—indeed, their strenuous efforts to elicit such evidence—readily distinguishes this case from *Stirone* and precludes the amendment claim now advanced. *United States v. Garguilo*, 554 F.2d 59, 62-63 (2d Cir. 1977); *Jackson v. United States*, 359 F.2d 260, 264 (D.C. Cir.), *cert. denied*, 385 U.S. 877 (1966). *See also*, *Ridge-*

* In *Ramirez*, the defendants were charged in a two count indictment with conspiracy, in violation of 21 U.S.C. § 846 and a substantive offense, in violation of 21 U.S.C. § 841(a)(1). This court held:

"[T]here [is no] . . . merit in Gomez' claims that there were variances between the indictment and proof, or a failure of proof, in that . . . the indictment charged violations relating to both Schedule I and Schedule II drugs, whereas the proof pertained solely to cocaine, a Schedule II drug." 482 F.2d at 816-817.

** Defendants do not argue that Count One, the conspiracy count, was amended.

way v. Hutto, 474 F.2d 22, 23 (8th Cir. 1973). The rationale for such a preclusion was explained at length in *Jackson*, where an indictment omitted but the *prosecution* proved that the defendant had committed a robbery by "a sudden or stealthy seizure or snatching." The trial court instructed the jury that the robbery could be proved in this manner or by showing a taking against resistance. Defense counsel did not object to the evidence or to the court's instructions. The Court held that the defendant's failure to object to the variant evidence precluded consideration of that argument on appeal,* reasoning that if a defendant were not required to object to evidence when first introduced he would be free to "take two bites at the apple." The defendant could press defenses at the trial based on the variant evidence, and if he lost, press his variance claims on appeal. *Jackson v. United States*, *supra*, 359 F.2d at 264 n.3.

Jackson and like cases make clear that in *Stirone* the Supreme Court did not overrule the doctrine of *Berger v. United States*, 295 U.S. 78 (1935), that actual prejudice is required before a variance can be said to affect substantial rights:

"If *Stirone* is pushed to extremes, it would reinstate the old rule making every variance fatal. *Stirone* is to be read in harmony with *Berger*, which was cited in and not repudiated in *Stirone*. . . . In every case of variance it can be argued that the grand jury that returned the indictment as is might not have been willing to return the indictment with variance. This possibility can never be conclusively eliminated as a matter of abstract logic. Whether there is a reasonable possibility of prejudice, however, should be determined with some reference to the real world of juries

* "It is decisive that in the case at bar, unlike *Stirone*, there was no objection to the introduction of the 'variant' evidence." 359 F.2d at 264. (Emphasis added).

and grand juries, and the realm of common sense which must guide the administration of the criminal law and rules of criminal procedure." *Jackson v. United States, supra*, 359 F.2d at 264.

By no sensible view of the record in this case can it be suggested that the purported variance affected substantial rights or prejudiced defendants. Here, as in *United States v. Quicksey, supra*, 525 F.2d at 341-42, upon which Judge Haight relied, there could be no question that defendants were neither misled, nor taken by surprise by the claimed variance that the narcotics involved were cocaine rather than heroin.

In *Quicksey* the indictment charged the defendant with violating the Travel Act by having an accomplice travel from New York to West Virginia to promote a heroin business, whereas the proof showed that cocaine and not heroin had been transported. In rejecting the defendant's variance argument the court held:

"Both drugs are narcotics. The gist of the charge in Count IX is engaging in interstate travel to promote a narcotics business. The type of narcotics is immaterial, unless *Quicksey* was misled and taken by surprise or unless he could not be protected against subsequent prosecution." 525 F.2d at 342.

As in *Quicksey*, it is clear in this case that none of the essential elements of the offenses charged were altered by defendants' claimed variance. The difference between cocaine and heroin did not affect the "core of criminality" to be proved, which consisted of possession with intent to distribute narcotic drug controlled substances. *United States v. Bernstein*, 533 F.2d 775, 787 (2d Cir.), cert. denied, 429 U.S. 998 (1976). The exact dates,

places, participants and their acts remained unchanged. In sum whether the substance packaged on the one occasion in Simpson's apartment by Knuckles, Smith and Brown, was heroin or cocaine did not alter any of the essential elements to be proved, nor did it create any possibility of confusion as to time and events. *United States v. Somers*, 496 F.2d 723, 744 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). Moreover, defendants never suggested, and still do not suggest, that they were surprised by the evidence they elicited, or prejudiced in any legitimate manner at trial by the claimed amendment. Finally, it simply cannot be doubted here that the Grand Jury indicted because of the presence of a narcotic drug controlled substance; whether that substance was heroin or cocaine could not possibly have altered the Grand Jury's decision to indict.

In conclusion, defendants' purported dichotomy between *Stirone* and *Berger* is meritless. The *Stirone* holding is inapplicable to the instant case for precisely the same reasons that defendants' formulation of the variance argument in the District Court was meritless. As the defendants themselves concede, the Government proved the facts set forth in the indictment as well as the names, places, times, and quantities of the controlled substances alleged. This concession is dispositive. *United States v. Garguilo*, *supra*, 554 F.2d at 63. The District Court's instruction, therefore, did not "amend" the indictment, but merely described the charges in the indictment and properly instructed the jury that defendants' claimed variance was immaterial. *United States v. Armone*, *supra*, 363 F.2d at 399. Defendants' present argument, made in disregard of *Berger*, that they are entitled to a second trial any time they inject an immaterial variance into their first, should be rejected.

POINT II**The Tape Recordings of Simpson's Telephone Conversations With Sims Properly Were Received in Evidence.**

Knuckles and Brown argue that the taped telephone conversations of October 12 and 14, 1976, in which Simpson asked for Sims intervention with Knuckles to obtain her share of the proceeds, were hearsay and should not have been admitted into evidence. Although Knuckles concedes that Simpson was a member of the conspiracy in August and October, 1976, and does not dispute the proof linking him with it, he argues that the Simpson-Sims taped recordings were exclusively narrative declarations of past facts and were not made in furtherance of the conspiracy. Defendants' claim that these recordings were not admissible as statements of co-conspirators pursuant to Fed.R.Evid. 801(d)(2)(E) is legally and factually inaccurate. Moreover, it is clear that the recorded conversations—which were totally consistent with Simpson's testimony and made prior to the motive to falsify suggested by defendants—were not hearsay, pursuant to Fed.R.Evid. 801(d)(1)(B) and therefore were admissible.

First, contrary to defendants' argument, the conspiracy here was far from over when Ms. Simpson requested Sims' help. Where the ultimate aim of the conspiracy is to profit from the illegal means used by the conspirators, the conspiracy continues at least until the fruits of the crime have been apportioned and the individual participants have assumed control of their shares. *United States v. Floyd*, 555 F.2d 45, 48 n.10 (2d Cir.), cert. denied, — U.S. —, 98 S.Ct. 163 (1977); *United States v. Rivera Diaz*, 538 F.2d 461, 464 (1st Cir. 1976); *United States v. Iacovetti*, 466 F.2d 1147, 1153 (5th Cir. 1972), cert. denied, 410 U.S. 908 (1973); *United States v. Sopher*, 362 F.2d 523, 527 (7th Cir.), cert. denied, 385

U.S. 928 (1966). Thus, although the heroin already had been "tabled" when Sims and Simpson spoke, the packaging was only a prelude to the ultimate aim of the conspirators: to reap the profit from their criminal enterprise and to apportion shares among themselves. When Simpson solicited Sims' assistance, apportionment of the heroin proceeds was precisely what prompted her request for intervention.

Second, Simpson's request that Sims help to resolve her quarrel with Knuckles clearly was in furtherance of the conspiracy. Whether her requests be characterized as "an act calculated to induce [Knuckles] . . . to stick with the original conspiracy," *United States v. Bigos*, 459 F.2d 639, 643 (1st Cir.), *cert. denied sub nom. Raimondi v. United States*, 409 U.S. 847 (1972), or as "an attempt to find a means to insure [the conspiracy's] . . . continuance, in the face of a serious disagreement between two of its key figures," *United States v. Manarite*, 448 F.2d 583, 591 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971), Simpson's request for help was designed to accomplish the object which first brought the conspirators together: an apportionment of their spoils. *Accord, United States v. Rivera Diaz, supra; United States v. Iacovetti, supra; United States v. Sopher, supra.*

Third, the fact that Simpson mentioned past events in soliciting Sims' *future* assistance does not affect the proper characterization of these conversations as in furtherance of the conspiracy. *United States v. Pardo-Bolland*, 348 F.2d 316, 324-25 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965).^{*} *Cf. United States v. Annunziato*, 293

^{*} "[T]he narration was not merely historical but was relevant to the criminal conspiracy in which . . . [the defendants] were engaging. A statement of one co-conspirator to another during the active course of a conspiracy, giving the full setting of an upset, with the purpose of getting reassurance or other help, does not cease to be in furtherance of the conspiracy because it contains a natural and pertinent reference to a past fact." 348 F.2d at 324-25.

F.2d 373, 380 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). Simpson could not reasonably have expected Sims' assistance unless she first explained to him the problem that prompted her request in the first instance—namely her previous dispute with Knuckles. That this explanation contained references to almost contemporaneous events of the past does not affect the admissibility of the recordings.* *United States v. Grant*, 462 F.2d 28, 33 (2d Cir.), *cert. denied*, 409 U.S. 914 (1972); *United States v. Pardo-Bolland*, *supra*; *United States v. Agueci*, 310 F.2d 817, 834 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *United States v. Tarricone*, 242 F.2d 555, 557 (2d Cir. 1957).

Finally, defendants' objection to these recordings is rendered totally without merit on this record since the Sims-Simpson conversations clearly were admissible as prior consistent statements offered to rebut an implied charge of recent fabrication and therefore were not hearsay. Fed.R.Evid. 801(d)(1)(B). Simpson testified that she had had the conversations with Warren Sims which were the subject of the tape recordings (Tr. 136),** and was available for cross-examination concerning the statements she had made, as was Warren Sims. During cross-examination of Simpson—and prior to the introduction of the recordings—defense counsel attacked Simpson's credibility by attempting to suggest that her testimony was the product of her cooperation agreement with

* Equally immaterial is the fact that Warren Sims was not himself a co-conspirator when Simpson solicited his aid. *United States v. Rivera Diaz*, *supra* (statement made to undercover Government informant); *Salazar v. United States*, 405 F.2d 74 (9th Cir. 1968) (per curiam) (statement to undercover agent).

** Simpson merely acknowledged the occurrence of the phone conversations with Sims, but did not testify as to the substance of the conversation.

the Government, and that Simpson was motivated to fabricate her testimony against defendants by her hope for leniency as a result of that cooperation (Tr. 163-166).^{*} Defense counsel renewed this theme during summations and put forward the suggestion that Simpson was falsely implicating the defendants to please the Government and save herself (Tr. 1019, 1031-32, 1048, 1057, 1060). Since Simpson's conversations with Warren Sims occurred before she was arrested, obviously, they antedate the implied motive to testify falsely. In the telephone conversations Simpson related in detail the events which just had occurred with Knuckles in a manner which directly paralleled her trial testimony as to the same events. Accordingly these conversations plainly were admissible as prior consistent statements. *United States v. McGrath*, 558 F.2d 1102, 1107 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3516 (February 21, 1978); *United States v. Lombardi*, 550 F.2d 827, 828 (2d Cir. 1977); *United States v. Rivera Diaz*, supra, 538 F.2d at 464; *United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972), cert. dismissed, 411 U.S. 923 (1973).

POINT III

Introduction of Smith's Redacted Statement Did Not Violate *Bruton*

Knuckles argues that the introduction of his co-defendant's, Rose Smith's, post-arrest statements, violated the rule set forth in *Bruton v. United States*, 391 U.S. 123 (1968). While defendant concedes that the redacted statement, which was offered and received solely against

^{*} For purposes of Rule 801(d)(1)(B), it is sufficient if a suggestion of improper motive or bias has been made, and the suggestion need not be made explicitly, but only impliedly. *United States v. Rodriguez*, 452 F.2d 1146, 1148-49 (9th Cir. 1972).

Smith, by itself "was neither clearly inculpatory nor vitally important to . . . [the Government's case]," (Knuckles Br. 31), Knuckles argues that it should not have been admitted because the jury could have inferred that he was the unidentified individual referred to in the statement. An analysis of the record here makes clear that the District Court properly received this evidence under *Bruton* and its progeny.

During the trial an extensively redacted version of Rose Smith's admissions to the agents and an Assistant United States Attorney were received in evidence.* These statements were received solely for the purpose of proving Smith's guilty participation in the conspiracy, and the trial judge gave the jury an appropriate limiting instruction to that effect. (Tr. 366-67). In substance, Agent Brophy testified that after advising Smith of her constitutional rights she stated that she had worked at the "table" at 626 Riverside Drive, mixing heroin with other people in October, 1976 and that she had not been paid for her work. (Tr. 367). To eliminate possible *Bruton* problems, names of the individuals with whom she had worked were deleted from the statement read to the jury. (Tr. 364, 367-79).**

It is settled law in this Circuit that there is no violation of a defendant's sixth amendment right of confrontation under *Bruton* unless the statements of a nontestifying

* Rose Smith's complete signed statement was provided to all counsel in advance of trial. (Tr. 357).

** Read to the jury was the following redacted statement:
 "A. I went to the table with other persons and Yogi at 626 Riverside Drive apartment. We worked all night. We mixed over a couple of thousand quarters. I don't know how many more. I helped other persons do other packages at the apartment at 319 West 116th Street. All packages were heroin. One of the people didn't pay me for working for that person." (Tr. 371).

co-defendant are both "clearly inculpatory" as to the complaining co-defendant, and "vitally important" to the government's case. *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). See also, *United States v. Sacco*, 563 F.2d 552, 556 (2d Cir. 1977), *cert. denied*, — U.S. —, 98 S.Ct. 779 (1978); *United States v. Gonzalez*, 555 F.2d 308, 314-317 (2d Cir. 1977); *United States v. Amrep*, 545 F.2d 797, 800 (2d Cir. 1976); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States ex rel. Nelson v. Follette*, 430 F.2d 1055 (2d Cir. 1970), *cert. denied sub nom. Nelson v. Zelker*, 401 U.S. 917 (1971). Knuckles' present argument fails to satisfy either of the *Bruton* conditions and therefore must be rejected.

Wingate v. United States, *supra* is the benchmark for judging Knuckles' *Bruton* argument. Wingate was convicted of conspiring to violate the narcotics laws after a trial during which the Government introduced the redacted written statement and an additional oral statement of his co-defendant. The written statement described the co-defendant's effort to obtain heroin from one "Mr. Bumpsie," and the oral statement informed the jury that the co-defendant "had been asked by someone at the Crotona Bar to get heroin for a customer; that he told him that he could obtain it from Mr. Bumpsie; and that the two drove to the airport to arrange things." *Wingate*, *supra* at 313. In light of independent evidence which showed that Wingate was in fact the man in the Crotona Bar and had been with Smith at the airport, Wingate argued that the co-defendant's statements in effect identified him as the co-defendant's co-conspirator. This Court rejected Wingate's argument and concluded that neither element of this two-pronged *Bruton* test was met. The co-defendant's statements were not clearly inculpatory *because they alone*

did not connect Wingate with his crime. The statements were not vitally important to the Government's case because independent evidence *directly* incriminated *Wingate*.

The facts of this case are in all material respect indistinguishable from *Wingate*. Smith's redacted statement did not directly identify Knuckles, nor, for that matter did it contain any physical description of the unidentified co-conspirators. While Knuckles now argues that he was "one of the people" to whom reference was made, under *Wingate* such an arguable connection between pieces of evidence does not make an otherwise clean statement "clearly inculpatory." Since Knuckles cannot prevail on this point unless he demonstrates that the statement *both* is clearly incriminatory *and* vitally important, this failure alone is dispositive of his claim. Moreover, as in *Wingate*, it is apparent that Smith's statement simply was not vital to the prosecution's case, against Knuckles and was not used in any manner against him. Knuckles, of course, was directly incriminated by his co-conspirator, Ms. Simpson, who was an eyewitness to his crime. Simpson's testimony was corroborated both by tape-recorded statements made in furtherance of the conspiracy and by the tape recorded pre-arrest admissions of Knuckles *himself*. Finally, the prosecutor at no time relied on Smith's statements as evidence of Knuckles' guilt.* Instead, in his summation he avoided any refer-

* Just as these facts render this case indistinguishable from *Wingate*, so too do they distinguish it from *United States v. Gonzalez, supra*. In *Gonzalez* this Court, applying the two-pronged *Wingate* rule, concluded that the prosecutor had incorrectly urged the jury to consider a statement by one defendant, which directly inculpated his co-defendant, as evidence of that co-defendant's guilt. Unlike the instant case, in *Gonzalez* the trial court had not cautioned the jury about the statement's limited admissibility when the statement was introduced, and the statement was the only direct evidence of the co-defendant's guilt.

ence to defendant Knuckles or Brown when he referred to Smith's statement, and claimed only that Smith's statement corroborated Simpson's testimony as against Smith. (Tr. 1008-09). In such circumstances, the trial judge's receipt of the redacted Smith statement, together with the delivery of an appropriate limiting instruction, did not violate *Bruton*.

POINT IV

The District Court Properly Admitted Evidence of Prior Narcotics Activity As Probative of the Background and Development of the Conspiracy

Knuckles and Brown argue that the trial judge erroneously admitted into evidence proof of a prior similar narcotics conspiracy among these same defendants. To buttress their otherwise unimpressive claim defendants assert that the Government overwhelmed them with an abundance of similar act evidence, and that this proof was designed only to paint them as "bad persons." These contentions exaggerate the amount of similar act proof and ignore the record, which manifests the proper reasons for introduction of the evidence of prior narcotics activities.

The Government introduced proof that from 1974 through early 1976, Knuckles, Brown, Sims, Simpson and others were engaged in a similar narcotics conspiracy as that charged in the indictment to distribute heroin quarter bags to street dealers. Defendants base[d] their earlier operations—as they did again later in the present conspiracy—at the Roma Gardens bar at 116th Street and 8th Avenue. As in the present conspiracy, Knuckles was at the helm of this earlier operation, directing matters from the Roma Gardens, with Brown serving as his chief assistant, and Sims and Simpson working with them in several capacities. The operation employed "table" fac-

tories, of the exact same nature as the one which centered in this case in September 1976. Simpson described her prior work for Knuckles at one of these factories. In early 1976, the operation of this enterprise lulled temporarily while Knuckles busied himself with a fish food stand at a penny arcade in South Carolina, but resumed active production as charged here upon Knuckles' return in the summer of 1976.

In sum, the prior act evidence here simply showed the background leading to the formation of the conspiracy charged, and provided important insights into the relationships among the defendants—relationships which picked up where they left off in 1976. This proof obviously was probative on these issues and Judge Haight, after carefully balancing the claimed prejudicial impact, correctly determined that the similar act evidence was admissible with appropriate cautionary instructions to the jury. (See, *e.g.* Tr. 53-56). This determination clearly was not an abuse of discretion.

The well-settled law in this Circuit, especially since the advent of Fed.R.Evid. 404(b),* is the inclusionary form of the rule that:

"[e]vidence of prior criminal acts is admissible *unless offered solely* to prove criminal character or disposition or the proffered evidence is of such a *highly* prejudicial nature as to *overwhelm* its probative value."

United States v. Magnano, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). (Emphasis

* Fed. R. of Evid. 404(b) states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

added). See also, *United States v. Gubelman*, Dkt. No. 77-1279, slip op. 1747, 1747-50 (2d Cir. February 24, 1978); *United States v. Benedetto*, Dkt. No. 77-1306, slip op. 1735, 1738 (2d Cir. February 24, 1978); *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (en banc); *United States v. Braunig*, *supra*; *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976); *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976); *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967).

In applying this rule to the facts of a given case, the trial court's analysis is two-fold. First, is the evidence relevant to some issue other than proving the defendants' character, and, second, if it is relevant, is the probative value of the relevant evidence substantially outweighed by the danger of unfair prejudice. *United States v. Gubelman*, *supra*, slip op. at 1750 Fed.R.Evid. 403; 404(b). Moreover, this Court repeatedly has recognized that the determination whether to admit similar act evidence is a decision best left with the sound discretion of the trial judge. The District Court's determination rarely will be disturbed on appeal and only if the trial judge acted arbitrarily or irrationally. *United States v. Robinson*, *supra*, 560 F.2d at 509, 514. See also, *United States v. Leonard*, *supra*, 524 F.2d at 1092.

In the present case, there can be no doubt that the district judge properly exercised his broad discretion in admitting prior act evidence to show the existing rela-

tionships between the conspirators and their confederates. *United States v. Araujo*, 539 F.2d 287, 289 (2d Cir.), *cert. denied, sub nom., Rivera v. United States*, 429 U.S. 983 (1976); *United States v. Natale, supra*, 526 F.2d at 1173-74, and to show how the conspirators came to bond themselves together in a criminal trust. *United States v. Moten*, 564 F.2d 620 (2d Cir. 1977). In short, the defendants' prior similar conduct was relevant to prove the background and development of the conspiracy, which this Court regularly has deemed to be a proper basis for admission of such evidence. *United States v. Moten, supra*; *United States v. Magnano, supra*, 543 F.2d at 435; *United States v. Torres*, 519 F.2d 723 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).^{*} *Cf. United States v. Hockridge*, Dkt. Nos. 77-1243, 77-1258, 77-1285, slip op. 2133, 2148 (2d Cir., March 27, 1978). Moreover, contrary to defendants' present argument, in view of their attack at trial on the credibility of Simpson, the similar conduct was of particularly high probative value since it explained how Simpson, based on her earlier relationship with Knuckles, was able to resume operations with Knuckles quickly and at her own apartment. The prior relationship between Brown, as lieutenant, and Knuckles, as commandant, further explained Brown's sudden reappearance at the "table factory" upon Knuckles' return to New York. Finally, Sims' earlier role as Knuckles' partner in the heroin enterprise readily explained why Simpson—dissatisfied with her later treatment at Knuckles' hands—would have asked Sims to intervene on her behalf.

^{*} The evidence also was relevant to prove that the defendants were willing participants and to prove that they intentionally and deliberately possessed heroin with intent to distribute it and conspired to do so. *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976); *United States v. Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), *cert. denied*, 429 U.S. 821 (1976).

Finally, in an effort to suggest an abuse of discretion where none occurred, defendants exaggerate the amount and effect of the similar act proof. Interestingly enough, although defendants speak of a "super abundance" of such proof (Knuckles' Br. at 33), they are hard pressed to show anything beyond the Government's uncomplicated demonstration of the prior conspiracy between the same defendants.* Similarly groundless and unsubstantiated is defendants' claim that the prosecutor somehow misused this evidence to bolster an otherwise "weak" case. The record plainly demonstrates that the Government did not "rely" on this evidence for any purpose other than the limited one for which it was received: to demonstrate the existence and background of the conspiracy.**

* Defendant Knuckles' claim that "well over half if not two thirds of the trial transcript dealt with proof of other crimes" is an unfounded exaggeration. (Knuckles Brief p. 34). Equally unfounded is his assertion that Ms. Simpson "was the sole substantive government witness" (Knuckles Brief p. 3) and that "the testimony of Warren Sims was received not to prove any matter relating to the crime charged." (Knuckles Br. p. 35). For example, Warren Sims made several tape recordings reflecting statements by co-conspirators Simpson and Knuckles in the course and in furtherance of the conspiracy charged in the indictment. During the trial he, *inter alia*, authenticated these tapes which were received and played to the jury. (Tr. 546-66). Moreover, Knuckles' question why Sims should have been allowed to testify to his prior association with the conspiracy is readily answered. Since Sims, Knuckles and Simpson all had been closely associated Simpson's decision to ask Sims to intervene in her behalf with Knuckles after the most recent venture, was natural and corroborative of Simpson's testimony. *United States v. Araujo, supra*.

** Equally baseless is Knuckles' claim that the prosecutor in summation misused the prior conduct admitted by Knuckles at his post-arrest interview. (Knuckles' Br. 36). The reference to Knuckles' admission came only *after* defendants had attacked the credibility of the Government witnesses. The Assistant United States Attorney at that point during his summation referred briefly to the statement of defendant Knuckles to *corroborate* the testimony of those witnesses. (Tr. 1007-08).

Finally, the trial judge repeatedly cautioned the jury—to the full satisfaction of defense counsel *—that this evidence was admitted only for a limited purpose and that the jury need not consider it at all.

In conclusion, Judge Haight properly weighed the probative value of this evidence against its claimed prejudicial effect, and decided that the probative value of evidence clearly warranted its admission. Surely, on this record, the District Court's careful and reasoned determination was not arbitrary and irrational.

POINT V

The Introduction Of Knuckles' Post Arrest Statement Was Proper.

As his final point, Knuckles claims that the introduction of his post arrest-post indictment statements constituted plain error. Although Knuckles never objected at trial to this evidence on any grounds, he now asserts, without any basis, that the statements violated his Sixth Amendment⁴ right to counsel and that the Government failed to prove that he waived such right. This claim ignores the record at trial and is without merit.

* Knuckles' trial counsel expressly suggested to the trial judge that there was no need in final instructions to review again the limiting instruction on similar act proof:

"Your Honor, I was going to suggest that I will make no request and I think it should be left alone. Co-counsel seriously considered that it be left alone. I think we covered it in summation. I think Mr. Levine covered it in summation. I think your Honor's limiting instructions during the whole trial was effective. It is an intelligent jury, they have listened to it." (Tr. 1169-70). (Emphasis added).

The evidence at trial showed that on May 6, 1977 Knuckles was arrested on the indictment by Special Agent Brophy and taken to DEA headquarters for processing. Agent Brophy, who testified at trial, fully advised Knuckles of his *Miranda* rights and specifically admonished him that "he had the right to a lawyer and if he could not afford a lawyer, one would be appointed by the court or the United States Magistrate." (Tr. 349). After processing, Knuckles was brought to the Office of the United States Attorney where he was again advised of his *Miranda* rights by an Assistant United States Attorney. (Tr. 349-50). After these repeated warnings, Knuckles stated that his nickname was Glenn and, in response to brief questioning, advised that "he hadn't done any heroin in over two years and didn't intend to do any." (Tr. 353). Although Knuckles spoke freely, he declined to sign his statement without a lawyer present. (Tr. 353). There is no evidence in the record or any suggestion that Knuckles was distraught, pressured, upset or weeping at any point before or after his arrest and processing. Moreover, Agent Brophy testified, without objection by the defense,* to Knuckles' statements and to the facts surrounding his arrest. (Tr. 349-353).

Since Knuckles failed to object to the admission of this evidence in the District Court, he may not press his arguments on this matter for the first time on appeal. *United States v. Fuentes, supra*, 563 F.2d at 531; *United States v. Braunig, supra*; *United States v. Martinez-Carcano, supra*; *United States v. Garguilo, supra*. See also, *United States v. Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

* Upon motion by counsel for co-defendants, appropriate limiting instructions were given as to this statement.

In any event, Knuckles' claim is meritless. The record here plainly shows that the Government satisfied its "heavy burden" of showing the voluntariness of Knuckles' waiver of his right to counsel. Unlike *Satterfield v. United States*, 558 F.2d 655 (2d Cir. 1976), upon which Knuckles relies, nothing in the record remotely suggests a pressuring or overburdening of defendant to relinquish his right to counsel. Rather, the facts here closely parallel *United States v. Lord*, 565 F.2d 831 (2d Cir. 1977), where the defendant made a full confession after he was orally advised of Fifth and Sixth Amendment rights. As here, the defendant claimed on appeal that the Government failed to prove that he had waived his right to counsel. This Court held that the Government had met its burden and explicitly distinguished *Satterfield* as a case where the defendant was distraught, upset and obviously out of control while in custody. As in *Lord*, in the face of the Government's uncontradicted evidence of a voluntary waiver, there is nothing in the record which leads one "to believe that [Knuckles] . . . did not waive his rights voluntarily and with a full appreciation for the significance of his admissions." *

* Knuckles' statements were made a short time after his arrest. This factor, together with Knuckles' prior experience with federal criminal charges (Tr. 493-95) and his willingness to invoke his rights when he wanted to—such as by later declining to sign a statement without his attorney—manifested clearly defendant's familiarity with the constitutional right to counsel.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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the following That on the *3rd* day of *April*
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Scott G. Campbell

~~Sworn to before me this~~
~~day of~~